

2011

Food Entrepreneurs and Food Safety Regulation

Nina W. Tarr
University of Illinois

Follow this and additional works at: <https://scholarworks.uark.edu/jflp>



Part of the [Administrative Law Commons](#), [Agency Commons](#), [Food and Drug Law Commons](#), [Jurisdiction Commons](#), [Law and Economics Commons](#), [Legislation Commons](#), and the [State and Local Government Law Commons](#)

Recommended Citation

Tarr, N. W. (2021). Food Entrepreneurs and Food Safety Regulation. *Journal of Food Law & Policy*, 7(1). Retrieved from <https://scholarworks.uark.edu/jflp/vol7/iss1/4>

This Article is brought to you for free and open access by ScholarWorks@UARK. It has been accepted for inclusion in *Journal of Food Law & Policy* by an authorized editor of ScholarWorks@UARK. For more information, please contact ccmiddle@uark.edu.

FOOD ENTREPRENEURS AND FOOD SAFETY REGULATION

*Nina W. Tarr**

I.	INTRODUCTION.....	35
II.	THE CONSUMER, THE FARM, AND THE FARMERS' MARKET.....	37
	<i>A. Greens, Fruits and Raw Vegetables.....</i>	43
	<i>B. Meat</i>	48
	<i>C. Eggs</i>	50
	<i>D. Chocolate</i>	52
III.	THE SMALL FOOD ENTREPRENEUR	54
IV.	COTTAGE FOOD INDUSTRY EXCEPTIONS	56
	<i>A. Who is Exempt?</i>	59
	<i>B. What Foods Are Exempt?</i>	61
	<i>C. Where Can the Food Be Sold?.....</i>	64
	<i>D. What Notice Is Required?.....</i>	65
	<i>E. What Does Exemption Mean?</i>	65
V.	CONCLUSION	66

I. INTRODUCTION

The street musicians' fiddles provide a harmonic sound track to a beautiful, sunny, Saturday June morning as neighbors greet each other while perusing the mixed salad greens, ripe colorful fruits, fresh farm eggs, farmstead goat cheeses, home-baked pies, artisan breads and chocolates, freezers full of grass-fed beef and pork, and free range chickens. It is a bucolic scene: local food growers and

* Professor, University of Illinois College of Law. The author would like to thank Michaela N. Tarr (J.D. Michigan 2009, Ph.D. Michigan State University, expected 2014) for consultation on this piece. Financial support was provided by the University of Illinois College of Law. The author would also like to thank Padgett Rice (J.D. Illinois, 2010), Dane Tousignant, (J.D. Illinois, 2011), and Nathan Briley (J.D. Illinois 2011) for research assistance and Brenda Faul for helping with formatting. The article is dedicated to Daniel Schreiber (deceased, 2010), artisan chocolatier, whose attempts to navigate the local food regulations inspired this work.

producers chatting with consumers who come back each week to participate in a direct and continuing conversation about food with someone they know, and to engage in commerce. This illusion of simplicity masks the ever-growing morass of conflicting, complicated, and expensive regulatory oversight that undermines the local food movement by creating barriers between producers and consumers. Those creating and implementing food policy in the United States are facing a fundamental dilemma of how to reconcile the local food movement with regulations designed to address concerns about food safety.

This article will unbundle some of the myriad of laws that vendors must navigate to sell directly to the public at one local farmers' market as a case study of what is happening in many communities. The article will begin with an examination of the legal issues regarding several foods on a local level to illustrate the pervasive and systemic problems that plague the local food movement throughout the country.¹ The federal, state, county and local laws on food are a confusing web of jurisdiction, substance and process.² Before food that is grown in a garden or on a farm gets to the consumer, it is harvested, stored, handled, and sold.³ Each of these steps is impacted by laws that are often ill-fitting to the small farmer who is trying to sell at a farmers' market. Data indicates that these smaller farmers are primarily engaging in direct sales to consumers.⁴ Food that is processed by small food entrepreneurs and artisans for sale at farmers' markets and roadside stands are also part of the "local food movement" and share the regulatory hurdles faced by placed on small farmers.

Several states have now passed "cottage food industry" statutes that provide exemptions from some of the state regulations. These exemptions are motivated by a desire to support the local food movement in hopes of improving health, economic development, and the environment. The second part of this article will compare several of these statutes to explore whether they provide adequate and appropriate relief for local food producers and consumers. Certain foods, such as raw milk, have received much attention but

1. See, e.g., STEVE MARTINEZ ET AL., USDA ECON. RESEARCH SERV., LOCAL FOOD SYSTEMS: CONCEPTS, IMPACTS, AND ISSUES (May 2010), available at <http://www.ers.usda.gov/Publications/ERR97/ERR97.pdf>.

2. See, e.g., *id.* at 28; John Bourdeau, *Food*, 19A Ill. Law & Practice § 5 (West 2011); Kristin Choo, *Hungry for Change*, ABA JOURNAL, Sept. 2009, at 56, 58-59.

3. MARTINEZ ET AL., *supra* note 2, at 18.

4. *Id.* at 18-19.

are not covered in this piece because they raise idiosyncratic and complicated safety issues.⁵ The goal of this piece is to focus on foods more likely to be sought after by mainstream consumers.

II. THE CONSUMER, THE FARM, AND THE FARMERS' MARKET

People are becoming more interested in the who, what, where, and how of the creation of the food that they eat,⁶ because of concerns such as food safety, personal health, quality and taste, local economic development, and the environment.⁷ These issues are inherently intertwined.⁸ For example, clear labeling about how food is produced, such as whether it is "organic" or contains chemicals, is one point of connection for food consumers and the law.⁹ Partially responding to consumers' perceived interests and partially driven by assumptions about economic development, legislatures have focused on "local" food boosterism.¹⁰ For example, in 2007, Illinois passed the Illinois Food, Farms and Jobs Act¹¹ that includes findings that support the proposition that "Illinois should be the Midwest Leader in local and organic food and fiber production."¹² The Act in-

5. See, e.g., Damien C. Adams et al., *Déjà Moo: Is the Return to Public Sale of Raw Milk Udder Nonsense?*, 13 DRAKE J. AGRIC. L. 305 (2008); GERSENDE CAZAUX, DAIRY BUS. INNOVATION CTR., STANDARDS AND REQUIREMENTS FOR RAW MILK PRODUCTS (July 2009), available at <http://www.dbicusa.org/documents/Raw%20Milk%20Cheese%20Legislation%20PDF.pdf>.

6. Susan A. Schneider, *Reconnecting Consumers and Producers: On the Path Toward a Sustainable Food and Agricultural Policy*, 14 DRAKE J. AGRIC. L. 75, 83 (2009) (citing such popular books as Michael Pollan's *The Omnivore's Dilemma: A Natural History of Four Meals* and films such as *King Corn* and *Food Inc.*).

7. MARTINEZ ET AL., *supra* note 2, at 29-30; Marie Coit, *Jumping on the Next Bandwagon: An Overview of the Policy and Legal Aspects of the Local Food Movement*, 4 J. FOOD L. & POL'Y 45, 47-48 (2008).

8. See, e.g., Mary Story, Michael W. Hamm, & David Wallinga, *Food Systems and Public Health: Linkages to Achieve Healthier Diets and Healthier Communities*, 4 J. OF HUNGER & ENVTL. NUTRITION 219, 222-24 (2009).

9. See, e.g., Schneider, *supra* note 7, at 84; Wendy Aguilar, *The Lowest Common Denominator: National Uniformity for Food Act*, SAN JOQUIN AGRIC. L. REV. 57, 60 (2007).

10. See, e.g., Neil D. Hamilton, *Rural Lands and Rural Livelihoods: Using Land and Natural Resources to Revitalize Rural America*, 13 DRAKE J. AGRIC. L. 179, 181 (2008); Neil D. Hamilton, *Emerging Issues of 21st Century Agricultural Law and Rural Practice*, 12 DRAKE J. AGRIC. L. 79, 86 (2007); Neil D. Hamilton, *Putting a Face on Our Food: How State and Local Food Policies can Promote the New Agriculture*, 7 DRAKE J. AGRIC. L. 407, 408-09 (2002).

11. Illinois Food, Farms, and Jobs Act., 505 ILL. COMP. STAT. ANN. 84/1 (West 2008).

12. *Id.* at § 5.

structed the Governor to appoint a Task Force to be convened by the Illinois Department of Agriculture, to designate the membership of the Task Force,¹³ and to charge the Task force to develop a plan for expanding and supporting a “State local and organic food system.”¹⁴ As a result of the work of the Task force, in 2009, the Illinois legislature passed the Local Food, Farms, and Jobs Act that encourages procurement of Illinois-produced food by state agencies,¹⁵ and creates a Local Food, Farms and Jobs Council.¹⁶ Other states have had similar councils whose missions have been to coordinate food policy, but have had minimal success.¹⁷

The route for food from the local¹⁸ farm to the local consumer’s table may be as direct as purchasing from the farm itself or indirectly through a farmers’ market, but all are regulated.¹⁹ According to the USDA, the number of farmers’ markets has grown by 92% since 1998.²⁰ Farmers’ markets are generally managed by some entity, such as a city, county, or business association, and the farmers rent space to sell their goods.²¹ Although consumers may feel reassured by a personal encounter with the person who is growing and producing their food, the consumers may not realize how many hurdles the farmer may have had to jump in order to comply with the rules of the market.²² This article will focus on the “direct sales” that take place at markets where the producer meets the consumer, which are distinguishable from “direct to consumer marketing” that might

13. *Id.* at § 10.

14. *Id.* at § 15.

15. Food, Farms, and Jobs Act, 30 ILL. COMP. STAT. ANN. 595/10 (West 2008).

16. *Id.* at § 15.

17. ALETHEA HARPER ET AL., INST. FOR FOOD DEV. & POLICY, FOOD POLICY COUNCILS: LESSONS LEARNED 6 (2009), available at http://www.foodsecurity.org/pub/Food_Policy_Councils_Report.pdf.

18. “Local” is a much-debated term depending on the interests of the people involved. For the purposes of this article, it will mean “as far as you have to go to get it.” So, in Illinois, eggs can be from the neighbor, but oranges are going to be coming from elsewhere in the country.

19. MARTINEZ ET AL., *supra* note 2, at 4-5.

20. *Id.* at 6 (“The number of farmers’ markets rose to 5,274 in 2009 up from 2,756 in 1998 and 1,755 in 1994, according to USDA’s Agricultural Marketing Service.”).

21. *Id.* at 5.

22. Negotiation, implementation, and enforcement of the rules for local farmers’ markets are individualized and would be the subject of another article. For example, market rules may limit goods to only those that are “organic” or grown without pesticides, produced within in certain geographic distance, sold by the person who actually grew them, or unprocessed. For an example from Urbana, Illinois, see http://www.city.urbana.il.us/urbana/community_development/economic_development/market/Vendor_Application.pdf.

include internet or catalog sales.²³ It is difficult to describe or quantify all of the benefits of direct sales of local foods to consumers.²⁴ Economic development, health and nutrition, food security and access, and environmental benefits are the most researched, and it is beyond the scope of this article to summarize all of the literature which is nicely reviewed in a USDA report entitled *Local Food Systems Concepts, Impacts, and Issues*.²⁵

Although some federal laws and programs have been implemented with the intent of encouraging local foods,²⁶ the countervailing national pre-occupation with food safety that creates a complex regulatory scheme eviscerates the efficacy of such policies.²⁷ The

23. MARTINEZ ET AL., *supra* note 2, at 5 ("The Census of Agriculture, conducted by USDA's National Agricultural Statistics Service every 5 years, currently provides the only measurable indicator of the direct-to-consumer local food marketing channel. However, 'direct-to-consumer marketing' and 'direct sales to consumers' as defined by the most recent agricultural census (2007) are not equivalent concepts. For example, catalog or Internet sales are included in the agricultural census as direct sales to consumers, but customers are typically not local (Hughes et al., 2007). Direct-to-consumer sales of agricultural products account for a small, but fast-growing segment of U.S. agriculture, increasing by \$399 million (49 percent) from 2002 to 2007, and by \$660 million (120 percent) from 1997 to 2007 (table 1). According to the 2007 Census, 136,800 farms, or 6 percent of all farms in the United States, sold \$1.2 billion worth of farm products directly to consumers, or 0.4 percent of all agricultural sales. If non-edible products are excluded from total agricultural sales, then direct-to-consumer sales as a percentage of agricultural sales increases to 0.8 percent in 2007 (Soto and Diamond, 2009). Direct-to-consumer marketing is also a small but growing share of U.S. at-home food consumption. In 2007, direct-to consumer sales grew to 0.21 percent of total home consumption, compared to 0.15 percent in 1997 (see table 1). Nationally, direct-to-consumer sales per farm averaged \$8,853.").

24. *Id.* at 42 ("It should be noted that local food systems have the potential to generate other public benefits. It has been suggested that local food systems could reduce food safety risks by decentralizing production (Peters et al., 2008). Eating locally has been viewed as a way to help preserve farmland by allowing new residential communities to be established on farms in urbanizing areas (Ikerd, 2005). Other public benefits include the development of social capital in a community, preservation of cultivar genetic diversity (see, for example, Goland and Bauer, 2004), and environmental quality. This is likely not an exhaustive list. Not all potential benefits of local food systems are discussed in this report because there is not adequate empirical research in 2010 on a particular topic, due to limited applicability to existing government programs, or a lack of a clear conceptual framework that relates local foods to these other potential impacts.").

25. *Id.* at 42-49.

26. See *id.* at 35-40 (listing laws such as the Farmer-to-Consumer Direct Marketing Act of 1976).

27. Susan A. Schnieder, *A Reconsideration of Agricultural Law: A Call for the Law of Food, Farming, and Sustainability*, 34 WM. & MARY ENV'T. L. & POL'Y REV. 935, 950-54 (2010); Shannon G. May, *Importing a Change in Diet: The Proposed Food Safety Law*

Food Safety and Modernization Act (FSMA), formerly known as Senate Bill 510, was signed into law on January 4, 2011.²⁸ FSMA is the federal response to concerns over the safety of food produced in the United States and imported from around the world.²⁹ It is estimated that fifteen federal agencies are responsible for monitoring food safety,³⁰ but the bulk of Federal oversight is done by the Food and Drug Administration (FDA), which is part of the United States Department of Health and Human Services, and the Food Safety Inspection Service, which is part of the United States Department of Agriculture (USDA).³¹ Senate Bill 510 strengthens the FDA so that it is responsible for approximately 80% of the food supply,³² both domestic and international. The USDA will continue to have jurisdiction over meat and poultry.³³ The intent of the Food Safety Mod-

of 2010 and the Possible Impact on Importers and International Trade, 65 FOOD & DRUG L. J. 1, 4-5 (2010); see also Denis W. Stearns, *On (Cr)Edibility: Why Food in the United States May Never Be Safe*, 21 STAN. L. & POL'Y REV. 245 (2010) (explaining why the current food safety regulatory and free market systems fail to create safe food in the United States).

28. FDA Food Safety Modernization Act, Pub. L. No. 111-353, 124 Stat. 3885 (2011).

29. Shannon G. May, *Importing a Change in Diet: The Proposed Food Safety Law of 2010 and the Possible Impact on Importers and International Trade*, 65 FOOD & DRUG L. J. 1, 2-5 (2010).

30. *Id.* at 4; see also A. Bryan Endres & Michaela Tarr, *United State Food Law Update: Initial Food Safety Restructuring Efforts, Poultry Production Contract Reforms and Genetically Engineered Rice Litigation*, 6 J. FOOD L. & POL'Y 103, 107-10 (2010) (discussing FDA attempts to better coordinate by creating an "Office of Food").

31. May, *supra* note 30, at 4-5 ("To the average consumer, the boundaries of the two agencies' jurisdictions are not only complex and nebulous, but also at odds with everyday distinctions among food groups. The FSIS regulates the production, nutritional standards, and labeling of domestic and imported meat, poultry and some egg products. FDA is responsible for the safety of all imported and domestic food products sold in interstate commerce that do not fall under the jurisdiction of the FSIS. This includes produce, dairy products, nuts, grains, juice, most seafood, processed foods, eggs and some meats. The exact division of responsibility between FDA and the FSIS is defined by statute, but the fine details are determined by Memoranda of Understanding.") (internal citations omitted). As has been pointed out, the dual jurisdictions can result in absurd outcomes. Choo, *supra* note 3, at 56 ("An open-faced, packaged chicken sandwich, for instance, is considered a meat product and regulated by the USDA, which would inspect the sandwich manufacturer daily. A packaged chicken sandwich with an extra slice of bread on it would fall under the purview of the FDA, which might inspect the manufacturer of the sandwich an average of once every five years.").

32. Helena Bottenmiller, *House Advances Food Safety Bill*, Food Safety News (Dec. 9, 2010), <http://www.foodsafetynews.com/2010/12/food-safety-bill-clears-house/>.

33. *Id.*

ernization Act is to shift the FDA towards prevention rather than crisis management.³⁴ It requires food safety plans, which can be very costly, and will hold international food producers to U.S. standards.³⁵ Small farmers and food producers fought the bill in its original form because it treated all food producers as if they were part of an industrial food complex.³⁶ Under the old Food, Drug, and Cosmetic Act, “farms” and roadside stands that were selling unprocessed foods were exempt from registering with the FDA.³⁷ As origi-

34. *Id.*

35. *Id.*

36. See, e.g., *Food Safety Talks: An Interview with NCAC's Ferd Hoefner*, SUSTAINABLEAGRICULTURE.NET (June 22, 2010), http://sustainableagriculture.net/blog/food-safety-interview/?utm_source=roundup&utm_medium=email; Rachell Robinson, *Senate Bill SB 210 and Your Right to Grow Your Own Food*, HUBPAGES.COM, <http://hubpages.com/hub/SB-510-and-your-right-to-grow-your-own-food>; see also James J. Gormley, *SB 210: A Food "Safety" Bill or Something Else*, ALLVOICES.COM, <http://www.allvoices.com/contributed-news/4548062-sb-510-a-food-safety-bill-or-something-else-entirely> (“Do you grow heirloom tomatoes you sell on your own property or at a local farmer’s market? If so, you will be in for a whopper of a surprise if Senator Durbin’s Senate Bill 510 (S.B. 510) passes: you may be receiving a visit from inspectors. Products not grown according to designated standards will be considered adulterated and your business records will be subject to warrantless searches by inspectors from the U.S. Food and Drug Administration (FDA), all this without any evidence that you have violated any law. Wonder why the National Guard or Federal agents have effectively imposed martial law by quarantining your town? Under S.B. 510’s House counterpart bill, H.R. 2749 (Section 133b, “Authority to Prohibit or Restrict the Movement of Food”), sponsored by Congressman Dingell, the Secretary of Health and Human Services will have the power to prohibit all movement of all food within a geographic area, whether the food is in your grandmother’s grocery bag in her Toyota Hybrid or on a flatbed. No court order will be needed, just a phone call to the appropriate state official and a public announcement will be sufficient.”).

37. 21 U.S.C.A. § 350d (a)–(b) (2006). According to 21 C.F.R. § 1.226, “farms” and “retail food establishments” and facilities regulated by the USDA are exempt from registering. See also 21 C.F.R. § 1.227(b)(3) (defining “farm”); 21 C.F.R. § 1.227(b)(11) (defining “retail food establishment”). According to Guidelines put out by the FDA, it seems that a farmstand selling an unprocessed food such as a tomato is exempt under this regulatory scheme. U.S. Food & Drug Admin., *Guidance for Industry: Questions and Answers Regarding Registration of Food Facilities* (Edition 4); *Final Guidance*, FDA.GOV (Aug. 2004), <http://www.fda.gov/Food/GuidanceComplianceRegulatoryInformation/GuidanceDocuments/FoodDefenseandEmergencyResponse/ucm082703.htm#b> (“2.2 Q: Is a farm that grows tomatoes and sells them directly to consumers from a roadside stand located on the farm exempt from registration? A: Yes. Assuming that the farm on which the tomatoes are grown otherwise satisfies the definition of farm (21 CFR 1.227(b)(3)), it is exempt from registration. If the primary activity of the roadside stand is selling food (including the tomatoes) directly to consumers, it is exempt as a retail food establishment (21 CFR 1.227(b)(11)).”). See also *Draft Guidance for Industry: Questions and Answers Regarding*

nally proposed, under the Food Safety Modernization Act, all food processors would have been required to register with the FDA, pay a \$500 annual registration fee, and create a hazard safety plan similar to what the FDA currently requires for non-produce food products.³⁸ Such fees and requirements would have been a huge burden on small producers. However, the Tester amendments included in the passed bill mean that “direct farm marketing” establishments are exempt from certain safety requirements.³⁹ The language is intended to include food producers who sell directly to consumers, as opposed to those that sell to wholesalers.⁴⁰ In addition, the Tester amendments exempt producers whose average annual gross income is less than \$500,000 from some of the reporting requirements and defer to state and local regulators to protect the public.⁴¹

the Reportable Food Registry as Established by the Food and Drug Administration Amendments Act of 2007 (2d ed.), 2010 WL 2388196 (FDA).

38. S.B. 210, 111th Cong. §§ 103, 213 (2010) (enacted); *see also* Choo, *supra* note 3, at 61.

39. Amendment KER10161 to S. 510, 111th Cong. (2010), *available at* http://tester.senate.gov/Legislation/upload/tester_direct_market_amendment.pdf.

40. *Id.* The amendments “exempt certain farms from certain produce safety requirements.” *Id.* For Tester’s press release and rationale, *see Tester to Introduce “common sense” Amendments to Food Safety Bill*, TESTER.SENATE.GOV (Apr. 14, 2010), http://tester.senate.gov/Newsroom/pr_041410_foodsafety.cfm. The rather convoluted language in Tester’s amendment is similar to the language in the current definition of a “retail food establishment”: “Retail food establishment means an establishment that sells food products directly to consumers as its primary function. A retail food establishment may manufacture/process, pack, or hold food if the establishment’s primary function is to sell from that establishment food, including food that it manufactures/processes, packs, or holds, directly to consumers. A retail food establishment’s primary function is to sell food directly to consumers if the annual monetary value of sales of food products directly to consumers exceeds the annual monetary value of sales of food products to all other buyers. The term ‘consumers’ does not include businesses. A ‘retail food establishment’ includes grocery stores, convenience stores, and vending machine location.” 21 C.F.R. § 1.227(b)(11); *see also* Choo, *supra* note 3, at 61.

41. Amendment WHI to S. 510, 111th Cong. (2010), *available at* http://tester.senate.gov/Legislation/upload/tester_small_facilities_amendment.pdf (noting that the amended “section shall not apply to a facility for a year if the average annual adjusted gross income of such facility for the previous 3-year period is less than \$500,000.”). There are unanswered questions about the application of the federal legislation to small producers who sell directly to consumers and are not engaged in interstate commerce. Some might argue that any local food sales have a “substantial impact” on interstate commerce because of the cumulative impact of all of the small farmers, but the complex issues associated with that question and the new Food Safety and Modernization Act must be left to another day. For a good history of the development of commerce clause jurisprudence, *see e.g.* Robert Wax, *United States v. Lopez: The Continued Ambiguity of Commerce Clause Jurisdiction*, 69

A. Greens, Fruits and Raw Vegetables

The line at the local farmers' market is always long for the washed, organic mixed salad greens that are in huge plastic bags in the farmer's truck and dumped into a large box for sale at his stand. Buyers use tongs to load the loose greens into shopping bags, which are then weighed. The steps in this process all matter. The farmer grows the lettuce, harvests it, washes it, stores it, transports it, and displays it for sale. In order to sell at the Urbana, Illinois farmers market, which is our case study, the farmer must apply for a permit to participate in the market from the Urbana Market Director (Director), who is a city employee.⁴²

As someone selling produce, our farmer is designated a "grower" whose farm must be inspected by the Director so that Director can confirm that the food is grown by the vendor in Illinois and to give the Director some "context" so that she can better sell the farmers' market as a whole.⁴³ The one-time cost for this Director-viewing is \$50, but there is no charge for subsequent visits in future years.⁴⁴ The cost to rent the space at the market depends on how many weeks the farmer wants to participate, how many spaces are required for the display, and whether the farmer will need electricity.⁴⁵ The rent can range from \$20.00 for a one-time fee to \$480 for the twenty-four-week season with a 10% discount for early appli-

TEMPLE L. REV. 275, 277-86 (1996). Wax discusses *Wickard v. Filburn*, 317 U.S. 111 (1942), in which the United States Supreme Court upheld the Agricultural Adjustment Act of 1938. The Court rejected the farmer's arguments that the federal government had no jurisdiction to set quotas for wheat that was grown and consumed on the farm. Even though the farmer's activities alone did not affect interstate commerce, the Court reasoned that the cumulative effect of all of such small farmers justified Congress's ability to act. *Id.* at 280 n.68. However, the Supreme Court decision in *United States v. Lopez*, 115 S.Ct. 1624, 1631-32 (1995), that limited Congressional action under the Commerce Clause, leaves the application of *Wickard* to local farm cases uncertain. *Id.* at 300. See also *Sisters of Visitation v. Cochran Plastering Co.*, 775 So.2d 759, 764 (Ala. 2000), *abrogated by Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52 (2003).

42. MARKET AT THE SQUARE VENDOR REGULATIONS, POLICIES, & APPLICATION MATERIALS (2011), available at http://www.city.urbana.il.us/urbana/community_development/economic_development/market/Vendor_Application.pdf.

43. *Id.* § IV A. Vendors must also have an Illinois Business Tax number. Products sold by weight must comply with the standards of the State of Illinois for sales by weigh and their scales must comply with standards of the State of Illinois for sales by weight. *Id.*

44. *Id.*

45. *Id.* at § V.

cants.⁴⁶ The lettuce farmer must attach all food licenses, permits, and certifications to her application to sell at the market.⁴⁷ Our farmer is now challenged to figure out what licenses, permits, and certifications she needs in order to sell lettuce. Her journey is simple compared to some of her neighbors at the market who sell such highly regulated products as meat or artisan chocolates. Urbana, Illinois, the location of our case study market, is in Champaign County. Under the Illinois Counties Code, County Boards are empowered “to do all acts and make all regulations which may be necessary or expedient for the promotion of health or the suppression of disease.”⁴⁸ Consequently, the Champaign County Board created the Champaign County Health Department, which has jurisdiction over “the preparation, manufacture, packaging, storing or distributing of food except for establishments governed by the Illinois Meat and Poultry Inspection Act.”⁴⁹ The Champaign County Health Department has geographic jurisdiction over everything in the county except areas falling within the Champaign Urbana Public Health District,⁵⁰ which includes the city of Urbana where the market is located. Municipalities in counties of over 2,000,000 are also responsible for regulating and inspecting food service establishments, but may enter into an intergovernmental agreement with a county health department to perform these functions.⁵¹ The Illinois Department of Health promulgated Technical Bulletin/Food #30 in May, 2010.⁵² Acknowledging the three-fold increase in farmers markets in the last decade since the previous Bulletin addressing farmers’ markets was promulgated, the Bulletin is designed to provide regulatory guidelines for foods at farmers markets and other similar events.⁵³ The Market Director in Urbana must manage her market consistently with the new Technical Bulletin, which has an Appendix referring to laws and regulations.⁵⁴

What does this mean for our small lettuce farmer’s trip to the farmers’ market? She may need inspections from the county where

46. *Id.*

47. *Id.* § IVA.

48. 55 ILL. COMP. STAT. 5/5-1052 (2008); 55 ILL. COMP. STAT. 5/5-25001.

49. Champaign County Ordinance 573 ch. 1.3.1(B).

50. Champaign County Ordinance 573 ch. 1.3.2(B).

51. 55 ILL. COMP. STAT. 5/5-1115.

52. ILL. DEP’T OF PUB. HEALTH, OFFICE OF HEALTH PROT., DIV. OF FOOD, DRUGS & DAIRIES, TECHNICAL INFORMATION BULLETIN/FOOD # 30 (2010), available at http://www.agr.state.il.us/farmersmarket/IDPH_TIBF30.pdf.

53. *Id.*

54. *Id.*

her farming operation functions, inspections from the Champaign Urbana Public Health District, and inspections from any other county in the state where she wants to participate in a farmers' market. If she wants to go into a large urban area, she may need a municipal inspection as well.⁵⁵ Her interaction with the consumers at the market, rather than on her farm or through one wholesaler, makes her simple business very complicated.

In order to sell at the Urbana farmer's market, the lettuce farmer must get a "food service permit" from the Champaign Urbana Public Health District.⁵⁶ Under the Ordinance, such a food service permit is required for any "retail food establishment," which is defined as "temporary food service establishments and mobile food units."⁵⁷ The Illinois Statute that authorizes the establishment of the Health District uses the same language, but then refers to other statutes that distinguish between "food service establishments" and "retail food stores."⁵⁸ If the farmer were selling from a farm stand, she would not be required to get these permits assuming she is not preparing food and thus not a "food service establishment."⁵⁹ Farm

55. 65 ILL. COMP. STAT. 5/11-20-15 (A) (2008).

56. See Champaign County Ordinance 573.

57. *Id.* at ch. 3.3.11.

58. 55 ILL. COMP. STAT. 5/5-1115(e) ("For the purpose of this Section, "retail food establishment" includes a food service establishment, a temporary food service establishment, and a retail food store as defined in the Food Service Sanitation Code, ILL. ADMIN. TIT. 77, § 750, and the Retail Food Store Sanitation Code, ILL. ADM. CODE TIT. 77, §760.") Under ILL. ADMIN. CODE tit. 77, § 750, "food service establishment" means "any place where food is prepared and intended for, though not limited to, individual portion service, and includes the site at which individual portions are provided. The term includes any such place regardless of whether consumption is on or off the premises and regardless of whether there is a charge for the food." Under ILL. ADMIN. CODE tit. 77, § 760.20, "retail food store" means any establishment or section of an establishment where food and food products are offered to the consumer and intended for, though not limited to, off-premises consumption. The term includes delicatessens that offer prepared food in bulk quantities only. The term does not include establishments which handle only prepackaged spirits; roadside markets that offer only fresh fruits and fresh vegetables for sale; food service establishments; or food and beverage vending machines. Champaign County Ordinance 573 distinguishes "Food Service" from "Food Retail" establishments. Champaign County Ordinance 573 ch. 3.3.11, ch. 3.3.36 (defining a "Food Service Establishment" as "any place where food is prepared..." and "Retail Food Store" as "any establishment or section of an establishment where food and food products are offered to the consumer and intended for, though not limited to, off-premises consumption.").

59. ILL. ADMIN. CODE tit. 77, § 750.

stands are explicitly exempted from the definition of “food retail store.”⁶⁰

Public Health Districts are charged with implementing the Illinois Food, Drug and Cosmetic Act⁶¹ and the Sanitary Food Preparation Act.⁶² The Districts are authorized by Section 21 of the Illinois Food, Drug and Cosmetic Act,⁶³ Section 11.1 of the Sanitary Food Preparation Act,⁶⁴ and the Food Handling Regulation Enforcement Act.⁶⁵ The Public Health District inspectors are to implement the Illinois Department of Public Health rules and regulations by making “sanitary investigations and inspections as [they] deem necessary for the preservation and improvement of the public health” of the state concerning the handling of food served to the public.”⁶⁶ These provisions leave a lot of discretion to the person who enforces them so the lettuce farmer may meet one county inspector’s criteria but not another’s, because of something like the location of her washing station. The inspectors for both Food Service and Food Retail are to complete a standardized form⁶⁷ and each of these inspections will cost the small farmer extra fees that cut into her profits.⁶⁸

According to the Illinois Food, Drug and Cosmetic Act, our farmer’s lettuce is defined as “a raw agricultural commodity” because it is a “food in its raw or natural state, including all fruits that are washed, colored or otherwise treated in their un-peeled natural form before marketing.”⁶⁹ As such, the sanitary requirements are

60. ILL. ADMIN. CODE tit. 77, § 760.20.

61. 410 ILL. COMP. STAT. ANN. 620 (West 2011).

62. 410 ILL. COMP. STAT. ANN. 650.

63. 410 ILL. COMP. STAT. ANN. 620/21.

64. 410 ILL. COMP. STAT. ANN. 650/11.1.

65. 410 ILL. COMP. STAT. ANN. 625.

66. 20 ILL. COMP. STAT. ANN. 2305/2(a).

67. ILL. ADMIN. CODE tit. 77, §§ 750.20, 760.20 (referring to the forty-five-item “Retail Food Sanitary Inspection Report”). For an example of such a form, see <http://www.c-uphd.org/documents/eh/mock-inspection-form.jpg>.

68. Each County may charge reasonable fees for inspections. 55 ILL. COMP. STAT. ANN. 5/5-1115(c). The municipalities may also charge reasonable fees. 65 ILL. COMP. STAT. ANN. 5/11-20-15. Fees in Urbana can be found at *Champaign-Urbana Public Health District Environmental Health Fee Schedule*, CHAMPAIGN URBANA PUB. HEALTH DISTRICT, <http://www.c-uphd.org/environmental-fees-cu.html> (last visited May 16, 2011) [hereinafter *Environmental Fee Schedule*].

69. 410 ILL. COMP. STAT. ANN. 620/2.18. According to the definitions of ILL. ADMIN. CODE tit. 77, § 750.10, the lettuce is a Ready-to-eat food, meaning a food that is in a form that is edible without washing, cooking, or additional preparation by the food establishment or the consumer and that is reasonably expected to be consumed in that form. Ready-to-eat food includes: unpackaged potentially hazardous

more lax than for other types of food products.⁷⁰ Under the 2010 *Illinois Department of Health Food Bulletin #30*, fresh vegetables that are “as harvested and not further processed: only minimally rinsed to remove visible soil, but otherwise unprocessed and unpackaged,” are saleable at farmers markets without further restrictions.⁷¹ Regulations for the Illinois Department of Public Health state that the vegetables must be free from filth and spoilage⁷² and must be washed in potable water.⁷³ However, the equipment needs are less stringent than for other foods⁷⁴ and the vegetables need not be wrapped for transport.⁷⁵

If our farmer had bagged the lettuce before taking it to market, she would have engaged in “processing,” which is defined as “manufactur[ing], compound[ing], intermix[ing] or prepar[ing] food products for sale or for customer service.”⁷⁶ The process of “cutting” the vegetables, including herbs, converts them to something that is ready to be eaten and therefore subject to more regulation.⁷⁷ The processing must take place in a facility that is certified by the local health department.⁷⁸ This is a food-processing establishment, which means a commercial establishment in which food is manufactured or packaged for human consumption.⁷⁹

Farmers may want to offer consumers a taste of their produce as a means of distinguishing their product from the neighboring stand. Consumers enjoy walking through the market, taste-testing the produce for quality and nuance. However, if the farmer slices

food that is cooked to the temperature and time required for specific food under Section 750.180; washed and cut raw fruit and vegetables; Whole raw fruits and vegetables that are intended for consumption without the need for further washing, such as at a buffet, but excluding whole raw fruits and vegetables offered for retail sale; and other food presented for consumption for which further washing or cooking is not required and from which rinds, peels, husks, or shells are removed. ILL. ADMIN. CODE tit. 77, § 750.10.

70. See discussions on meat, *infra*.

71. TECHNICAL INFORMATION BULLETIN/FOOD #30, *supra* note 53.

72. ILL. ADMIN. CODE tit. 77, § 760.100; ILL. ADMIN. CODE tit. 77, § 750.100 (noting that food should be safe for human consumption). 410 ILCS 620/10(a)(3).

73. ILL. ADMIN. CODE tit. 77, § 750.170.

74. ILL. ADMIN. CODE tit. 77, § 760.750.

75. ILL. ADMIN. CODE tit. 77, § 760.290.

76. ILL. ADMIN. CODE tit. 77, § 750.10; 77 ILL. ADMIN. CODE tit. 77, § 760.20.

77. TECHNICAL INFORMATION BULLETIN/FOOD #30, *supra* note 53. Note that Herbs must be chopped, blended, or otherwise packaged in an inspected facility. *Id.*

78. ILL. ADMIN. CODE tit. 77, § 615.310(b)(3)-(4); TECHNICAL INFORMATION BULLETIN/FOOD #30, *supra* note 53.

79. ILL. ADMIN. CODE tit. 77, § 750.10 (“The term does not include a food service establishment, retail food store, or commissary operation.”).

an apple to offer a taste, health regulations would require hand washing in a temporary hand washing station similar to the one illustrated in the diagram in the Illinois Department of Health Technical Information Bulletin/Food #30.⁸⁰ The hand-washing station is to have hot water that comes out of a hands-free spigot.⁸¹ The sole proprietor at the farm stand is unlikely to be able to run to a communal hand-washing station, and so could be required to have one at his or her stand. The end result is that farmers will have great difficulty offering tastes.

The local Health Department is required to assess every food facility for relative risk of food borne illnesses, by classifying the facility as Category I, II or III, depending on the product being handled, the methods used, how it is stored, etc.⁸² A Category I facility holds hot or cold food for longer than 12 hours.⁸³ So, a restaurant with a walk-in cooler would be a Category I facility.⁸⁴ A Category II facility still cooks food but does not hold it for longer than 12 hours.⁸⁵ Raw vegetables are a low risk food and thus the lettuce farmer's establishment is likely to be a Category III facility.⁸⁶ As a Category III facility, it must be inspected every two years and the fees will be less than establishments in the lower categories.⁸⁷

B. Meat

The farmer who arrives at the market with frozen portions of locally grown meat has jumped through even more hurdles than the farmer selling lettuce.⁸⁸ Again, leaving aside the question of whether the meat is accurately labeled according to federal and state regulations, the meat seller is subject to higher standards under all of the

80. TECHNICAL INFORMATION BULLETIN/FOOD #30, *supra* note 53, at 3.

81. *Id.*

82. ILL. ADMIN. CODE tit. 77, § 615.310(b)(3).

83. *Id.*

84. *Id.*

85. *Id.*

86. ILL. ADMIN. CODE tit. 77, § 615.310(b)(3)(C).

87. The Champaign Urbana Public Health District charges \$150 a year for a Category III and \$400 a year for a Category I establishment. *Environmental Fee Schedule*, *supra* note 69.

88. See MARTINEZ ET AL., *supra* note 2, at 25. ("Farmers have stated that regulatory and processing barriers to meat and value-added product sales present significant obstacles to increasing local sales (Ostrom, 2006). Smallscale meat processing facilities often lack capacity, equipment, acceptable inspection status, and human/financial capital to meet demand requirements (Matteson and Heuer, 2008).").

state and local health department regulations. According to the category descriptions noted above, a farmer selling prepackaged frozen meat could be considered a Category III facility based on the fact that the meat is not prepared at the establishment and is prepackaged by a commercial processor.⁸⁹ However, the farmer's frozen meat stand could also be classified as a Category II facility because the risk-based classification system, despite the guidelines, is still at the discretion of the local health department.⁹⁰ With a higher risk-based classification come more inspections,⁹¹ and thus more fees for the local health department and potentially a higher registration fee for the market.⁹² The meat vendor's establishment may be classified as a Category III facility one year but then a Category II facility the next, even if her operation is exactly the same both years. The local health department must show that any re-classification was based on the Hazard Analysis Critical Control Points concepts.⁹³

The farmer is also subject to the Illinois Department of Agriculture regulations. The animals are usually brought to a certified meat processing plant where they are butchered, the meat portions are wrapped, and then frozen. The meat is then transported back to the farm in a freezer and stored. Each of these steps is regulated.

Even if the small farmer uses a licensed commercial processor to process their meat, she cannot simply store the frozen, sealed patties of meat in freezers at her home.⁹⁴ Wherever the meat is stored prior to sale at the market, it must be kept in a freezer in a room with tight-fitting, self-closing doors, floors made of smooth durable material, sufficient ventilation, and be reasonably free of litter and articles not essential to the storage of the meat.⁹⁵ The regulations are such that the farmer must essentially have an entire room or entire building dedicated solely to housing the freezers of meat. Obviously, the regulations are meant for storage conditions at establishments where the food is actually sold, but a farmer who is selling her product only at the farmers' market and only storing the product at her home must still comply with all of the food storage regulations.

89. ILL. ADMIN. CODE tit. 77, § 615.310(b)(3).

90. ILL. ADMIN. CODE tit. 77, § 615.310(b)(3)-(4).

91. *Id.*

92. *Environmental Fee Schedule*, *supra* note 69.

93. ILL. ADMIN. CODE tit. 77, § 615.310(b)(3)-(4).

94. *See generally* ILL. ADMIN. CODE tit. 77, § 760.150.

95. *See* ILL. ADMIN. CODE tit. 77, § 760.120-1440.

According to USDA regulations for meat storage,⁹⁶ if the farmer sells directly to the public from the farm, she needs a meat broker's license that is somewhat dependent on the size of the cuts that she sells. If the farmer sells more than 300 pounds of cattle meat to a consumer, or the farmer's total sales to household consumers is less than 75% of her total sales, she will be subject to additional inspection by the USDA.⁹⁷

C. Eggs

In Europe and many other parts of the world, eggs are not refrigerated for sale even in grocery stores, and they are sold individually in open markets. In the United States, eggs are treated as a separate and especially vulnerable commodity that fall under multiple federal and state agencies' jurisdiction.⁹⁸ The FDA inspects eggs that are in their shells and the feed that chickens eat. The USDA has jurisdiction over egg products, including liquid, frozen and dehydrated eggs and the laying facilities.⁹⁹ States may have their own regulatory scheme for eggs as well. For example, the Illinois Department of Agriculture administers the Illinois Egg and Egg Products Act¹⁰⁰ and accompanying regulations¹⁰¹ regarding the sale of

96. See generally 9 C.F.R. § 301.2 (2010); 9 C.F.R. § 303.1.

97. 9 C.F.R. § 303.1(d).

98. See, e.g., Federal Egg Products Inspection Act, 21 U.S.C. § 1031 (2006) ("Eggs and egg products are an important source of the Nation's total supply of food, and are used in food in various forms. They are consumed throughout the Nation and the major portion thereof moves in interstate or foreign commerce. It is essential, in the public interest, that the health and welfare of consumers be protected by the adoption of measures prescribed herein for assuring that eggs and egg products distributed to them and used in products consumed by them are wholesome, otherwise not adulterated, and properly labeled and packaged. Lack of effective regulation for the handling or disposition of unwholesome, otherwise adulterated, or improperly labeled or packaged egg products and certain qualities of eggs is injurious to the public welfare and destroys markets for wholesome, not adulterated, and properly labeled and packaged eggs and egg products and results in sundry losses to producers and processors, as well as injury to consumers. Unwholesome, otherwise adulterated, or improperly labeled or packaged products can be sold at lower prices and compete unfairly with the wholesome, not adulterated, and properly labeled and packaged products, to the detriment of consumers and the public generally.")

99. Gretchen Goetz, *Who Inspects What? A Food Safety Scramble*, FOOD SAFETY NEWS (Dec. 16, 2010), <http://www.foodsafetynews.com/2010/12/who-inspects-what-a-food-safety-scramble/>.

100. 410 ILL. COMP. STAT. ANN. 615 (West 2011).

101. ILL. ADMIN. CODE tit. 8, § 65 (2008).

eggs. On the very local level, some communities allow individuals to keep a limited number of laying chickens in their backyards for the production of eggs.¹⁰² So, the vendor at the market with local eggs must comply with a different set of food regulations than the vegetable grower at the next stand.

In July 9, 2009 the Food and Drug Administration (FDA) issued a Rule requiring “shell egg producers to implement measures to prevent *Salmonella Enteritidis* (SE) from contaminating eggs on the farm and from further growth during storage and transportation.”¹⁰³ The Rule went into effect on September 8, 2009, and impacts farmers who have 3,000 or more laying hens at a particular farm, and who do not sell all of their eggs directly to consumers, but produce shell eggs for the table market.¹⁰⁴ The Rule requires: “developing a written SE prevention plan that meets the regulations specific requirements; environmental testing; egg shell testing in some circumstances; maintenance of records to show compliance; and requirements for refrigeration of eggs being held and transported.”¹⁰⁵ The thousands of comments on the proposed Rule included arguments that the small producers should be required to meet the same requirements because they were under-resourced, which caused risk.¹⁰⁶ On the other side were those who maintained that the size of the large producers created the risk and the regulations were unduly expensive for the smaller producers.¹⁰⁷ This argument won out with the F.D.A.

The summer of 2010 saw an outbreak of 1,500 cases of salmonella associated with the eggs produced on huge industrial farms in Iowa and illustrates the national debate on whether the commodity itself is potentially dangerous or if the method of production is the cause of the hazard.¹⁰⁸ Any eggs sold through interstate commerce

102. See e.g. *Chicken Ordinances and Laws*, URBAN CHICKENS, <http://urbanchickens.org/Chicken-ordinances-and-laws> (last updated May 27, 2011); MAD CITY CHICKENS, <http://www.madcitychickens.com/> (last visited May 27, 2011); *Chicken Ordinances and Laws; North Carolina, Charlotte and Concord*, URBAN CHICKENS, <http://urbanchickens.org/North-Carolina#charlotte> (last updated May 27, 2011).

103. A. Bryan Endres & Michaela Tarr, *United States Food Law Update: Initial Food Safety Restructuring Efforts, Poultry Production Contract Reforms and Genetically Engineered Rice Litigation*, 6 J. FOOD L. & POL'Y 103, 119 (2010).

104. *Id.* at 119-20.

105. *Id.* at 120-21.

106. *Id.* at 121.

107. *Id.* at 122.

108. See, e.g., Monica Davey, *Heart of Iowa as Fault of Egg Recall*, N.Y. TIMES, Aug. 28, 2010, <http://www.nytimes.com/2010/08/27/us/27eggs.html>.

and by a means that “substantially impact(s) interstate” commerce must comply with the Federal Egg Product Inspection Act.¹⁰⁹ The DeCosters’ operation, which was the major producer of the tainted eggs, produced 2.3 million eggs in a week and had been subject to an inspection scheme that failed.¹¹⁰

D. Chocolate

Chocolate has its own peculiarities, but shares some characteristics with baked goods, jams, jellies, and pickles. These are clearly processed foods that someone is transforming from raw goods into a finished product, and are often referred to as having added value. In Illinois, this production must be done in a certified commercial kitchen, and home-produced baked goods, jams, pickles and candies could not be sold at a market.¹¹¹ Creating such a commercial kitchen is prohibitively expensive for the small producer.¹¹² For example, at hearings regarding the passage of a cottage food industry bill in Michigan that exempted small food producers who earn less than \$15,000 a year, it was estimated that “setting-up a commercial kitchen to produce jams and jellies for local sale can cost as much as \$30,000—an amount that meets requirements for commercial sized ovens, compartmentalized sinks, plumbing, industrial appliances such as refrigerators, separated storage areas, water testing, handicapped accessibility, local health department inspections, and state licensure.”¹¹³ Thus, it would be practically impossible for a small producer or start-up to have their own commercial kitchen.

There is an entire section of the Illinois Administrative Code dedicated to chocolate processing.¹¹⁴ Despite the specificity of the code title, the regulations of this section are still far from definite. The generality of the regulations can be a bane or a boon to the chocolate processor. The lack of detail allows for the possibility that

109. Federal Egg Products Inspection Act, 21 U.S.C. § 1031 (2006); Endres & Tarr, *supra* note 101, at 119-24.

110. Davey, *supra* note 106; Federal Egg Products Inspection Act, 21 U.S.C. § 1031; Endres & Tarr, *supra* note 101, at 119-24.

111. ILL. ADMIN. CODE tit. 77, § 615.310(b)(3)-(4); TECHNICAL INFORMATION BULLETIN/FOOD #30, *supra* note 53.

112. HOUSE FISCAL AGENCY, LEGISLATURE ANALYSIS—FOOD LAW EXEMPTIONS: “COTTAGE FOOD OPERATIONS”; “HONEY”; MAPLE SYRUP 1-2 (2010), *available at* <http://www.legislature.mi.gov/documents/2009-2010/billanalysis/House/pdf/2009-HLA-5280-3.pdf>.

113. *Id.*

114. ILL. ADMIN. CODE tit. 77, § 738.100-940.

there are many ways to comply with a regulation, and the law remains flexible to accommodate entrepreneurs who have access to varying amounts of money, space, or other constraints. More often, however, it is the case that the health inspector in charge of ensuring compliance with the regulations sees only one way of doing things and the food entrepreneur must meet that inspector's expectations or be shut down.

For instance, part of the chocolate-making process involves separating the cocoa bean husks from the nibs after they have been cracked open by using air to sift the lighter husks from the heavier nibs. It is a laborious process if undertaken manually,¹¹⁵ and many small-scale chocolate-makers will accomplish this stage using winnowers of their own creation.¹¹⁶ Small-scale commercial cocoa bean winnowers do exist, but they will cost a chocolate entrepreneur thousands of dollars¹¹⁷ in addition to the costs of a commercial kitchen space. A health inspector, unfamiliar with the chocolate-making process, may balk at a winnower created out of PVC and a shop-vac, and require the cost-prohibitive stainless steel commercial contraption even though it is essentially the same machine and the regulations only require that equipment "be so designed and of such material and so fabricated as to be smooth, easily cleanable and durable, and shall be in good repair."¹¹⁸

In addition, the chocolate processor must comply with labor intensive cleaning processes that may not be conducive even to commercial equipment. A small-scale chocolate entrepreneur will likely have to wash his equipment manually, which, according to the regulations for food processing generally, requires washing equipment in a three-compartment sink.¹¹⁹ A commercial wet grinder used for grinding the cocoa beans is large and highly cumbersome, if not impossible, to clean in three different sinks.¹²⁰ Because of this, a health inspector could, at her discretion, decline to certify the

115. *Winnowing, a Key to Quality*, AMANOCHOCOLATE.COM (Aug. 17, 2010, 4:31 PM), <http://www.amanochocolate.com/articles/cocoabeanwinnowing.html>.

116. *The Mast Brothers at Their Chocolate Factory in Brooklyn*, THESELBY.COM, http://www.theselby.com/1_8_10_mast_brothers/ (last visited May 16, 2011) (showing pictures of the chocolate-making process in a small-scale chocolate plant in Brooklyn, NY).

117. *Winn-15 Mini Cocoa Bean Winnower for Cocoa Nib Production*, BLT-INC.COM, <http://www.blt-inc.com/winn15.htm> (last visited Mar. 16, 2011).

118. ILL. ADMIN. CODE tit. 77, § 738.420.

119. ILL. ADMIN. CODE tit. 77, § 750.820.

120. *ECGC Grinder*, COCOATOWN.COM, http://www.cocoatown.com/index.php?option=com_content&view=article&id=49&Itemid=56 (last visited Mar. 16, 2011).

equipment even though the regulations only require that equipment shall be taken apart for cleaning "insofar as necessary."¹²¹

III. THE SMALL FOOD ENTREPRENEUR

The small food producer, who wants to sell cookies, pies, breads, chocolates or the like, is faced with a constant barrage of strict interpretations of vague regulations that either cause his operational costs to skyrocket or force him to give up the operation altogether. His food processes may mirror a small certified food processor in another state, and he may even have passed certification if he had been visited by a different health inspector from the same county department. Yet, because of the indefiniteness of the regulations, success in certification can be left entirely to luck of the draw.

Not only might a food entrepreneur be prohibited from selling, but health departments have authority to seize and destroy food products that are out of compliance.¹²² The Chicago Tribune reported on a case in February, 2010 in which a woman had purchased over \$1,000 of fruit the previous season from a Green Market, had prepared and frozen the puree in a certified commercial kitchen, and as she began to prepare gelees from the fruit puree in another certified kitchen, the Chicago Department of Health Inspectors arrived.¹²³ The inspectors seized the fruit puree and told her that she could not use it for commercial purposes.¹²⁴ She asked to keep the fruit puree for personal use, and her son tried to carry out one of the coolers, but the inspectors tore open all of the packages and poured bleach on the food so it could never be used.¹²⁵ The health department prohibited any use of the food because the "processor" did not have the proper licenses.¹²⁶ The implication is

121. ILL. ADMIN. CODE tit. 77, § 730.7050.

122. Monica Eng, *Health Department Tussle with Shared Kitchen Updated*, CHI. TRIB. (Feb. 11, 2010), [http://leisureblogs.chicagotribune.com/thestew/2010/02/health-department-tussle-with-shared-kitchen-updated.html?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+chicagotribune%2Fthestew+\(Chicago+Tribune+-+The+Stew\)](http://leisureblogs.chicagotribune.com/thestew/2010/02/health-department-tussle-with-shared-kitchen-updated.html?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+chicagotribune%2Fthestew+(Chicago+Tribune+-+The+Stew)); Monica Eng, *Health Department Destroys Thousands of Dollars of Local Fruit*, CHI. TRIB. (Feb. 5, 2010), <http://leisureblogs.chicagotribune.com/thestew/2010/02/health-department-destroys-thousands-of-dollars-of-local-fruit.html>. The inspectors destroyed other food such as organic granola bars at the same facility. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

that without the proper licenses, the city has no assurances that the food is safe, although one could argue, more cynically, that the city simply wanted its fee. Ironically, the woman who was trying to make the gelees had applied for a license and invited the inspectors to come to the facility.¹²⁷ She estimated a loss of \$6,000 in revenue from the destruction.¹²⁸

There are a growing number of certified commercial kitchens, where small food producers are able to rent time with equipment, storage, and production space in order to produce added-value goods.¹²⁹ The certified kitchens can be managed by not-for-profit organizations or for-profit entities.¹³⁰ In some cases, the certified kitchen is part of an on-going commercial enterprise, such as a res-

127. Eng, *Health Department Destroys Thousands of Dollars of Local Fruit*, *supra* note 122.

128. Beyond the scope of this article is the discussion of the Food and Drug Administration Amendments Act of 2007 (FDAAA), establishing a "Reportable Food Registry," an FDA-managed database designed to document food adulteration and, "Guidance for Industry: Questions and Answers Regarding the Reportable Food Registry as Established by the Food and Drug Administration Amendments Act of 2007" that requires a "responsible party" to use an electronic portal to submit a report if the responsible party determines that an article of food is a "reportable food." See, e.g., Sarah Taylor Roller, Raqiyyah R. Pippins & Jennifer W. Ngai, *FDA's Expanding Postmarket Authority to Monitor and Publicize Food and Consumer Health Product Risks: The Need for Procedural Safeguards to Reduce "Transparency" Policy Harms in the Post -9/11 Regulatory Environment*, 64 FOOD & DRUG L.J. 577, 582 (2009); see also Draft Guidance for Industry: Questions and Answers Regarding the Reportable Food Registry as Established by the Food and Drug Administration Amendments Act of 2007, 74 Fed. Reg. 27,803 (June 11, 2009); see also FDA Food Safety Modernization Act, S. 510 111th Cong. § 101(a) (2009); FDA Globalization Act of 2009, H.R. 2749, 111th Cong. § 106(a) (2009); Section 106(a) of the FDA Globalization Act would expand FDA's discretionary authority to access and copy company records not only when it has a "reasonable belief" that an article of food presents a threat of serious adverse health consequences or death, but also when an article of food is "misbranded, or otherwise in violation of the Act." *Id.* In addition, under section 101(a)(1), whenever FDA has a reasonable belief that an article of food presents a threat of serious adverse health consequences or death, the agency would have the discretionary authority to access and copy records not only with respect to that article of food, but also "any other article of food likely to be affected in a similar manner." *Id.* Senate Bill 510 § 101 covers the Hazard Prevention.

129. See, e.g., Fernanda Santos, *A Kitchen-for-Rent Is a Lifeline for the Laid-Off*, N.Y. TIMES, (Dec. 15, 2010), http://www.nytimes.com/2010/12/15/nyregion/15kitchen.html?_r=1&src=ISMR_HP_LO_MST_FB&hp:p://pafoodventures.psu.edu/incubators.html.

130. For an example of a non-profit community kitchen, see *Can-Do Kitchen Project*, FAIR FOOD MATTERS, <http://www.fairfoodmatters.org/candokitchen.php> (last visited Mar. 12, 2011). For an example of a for-profit kitchen, see *Kitchen Chicago, About-Us*, KITCHEN CHI., <http://www.kitchenchicago.com/> (last visited Mar. 12, 2011).

taurant or catering business, which rents out the kitchen as a means of meeting expenses.¹³¹ In other situations, the communal kitchen is the major focus of the entity and it may provide ancillary opportunities such as storage, on-sight sales, cooking classes, and business support for food entrepreneurs.¹³²

Historically, churches and schools might have let small food producers use their space, but the potential liability associated with allowing food production has halted such informal arrangements or driven them underground. Informal conversations with foodies around the country uncover that processed food has become the parallel to bathtub gin during Prohibition, and food entrepreneurs can be quite creative at finding ways to avoid the regulations, such as setting up food-buying clubs that require membership to buy a home-cured ham.¹³³ These arrangements have an uncanny resemblance to Speakeasies. Even if a small producer simply wants to wash, cut, and bag raw produce, he or she must meet food processing regulations. Several communities are attempting to create food processing facilities for the small producers who would otherwise have to ship their goods a long distance at great expense.¹³⁴ Such community kitchens and food processing plants are not a sufficient solution for the small food producers who are trying to manage the myriad of food regulations as they attempt to sell directly to consumers.

IV. COTTAGE FOOD INDUSTRY EXCEPTIONS

Agricultural policy in the United States has supported the industrialization of food production. “The goal of an industrialized farming operation is to produce mass uniform output with the lowest cost of production possible; specialization in the production of

131. For example, Mr. C's Catering provides multiple community kitchen spaces in addition to its catering business. *Mr. C's Catering and Kitchen Rental*, MR. C'S CATERING, <http://mrcscatering.com/> (last visited Mar. 12, 2011).

132. La Cocina, a non-profit in San Francisco, provides business development for poor and minority food entrepreneurs. *La Cocina*, LACOCINASF.ORG, <http://www.lacocinasf.org/> (last visited Mar. 12, 2011). Splice Kitchen in Chicago, IL opens the front of its space as a test restaurant and market. *How it Works*, SPLICE KITCHEN, <http://www.splicekitchen.com/index.php> (last visited Mar. 12, 2011).

133. See, e.g., *This Little Piggy*, THIS LITTLE PIGGY, <http://thislittlepiggy.us/> (last visited Mar. 12, 2011).

134. See, e.g., *Blue Ridge Food Ventures*, ADVANTAGEWEST.COM, http://www.advantagewest.com/content.cfm/content_id/144/section/food (last visited Mar. 12, 2011).

one product replaces diversification.”¹³⁵ Industrialized farming and mono-culture hurts the quality of our food, our health, our sense of food security, and farmers’ perceptions of themselves as the providers of a public good.¹³⁶ There is some argument that food safety anxiety is a response to the problems of big agriculture that requires the use of chemicals, drugs, prolonged storage, and extended shipping.¹³⁷ Products are consolidated and consumers have no idea where their food comes from or who has produced it.¹³⁸ Agricultural law specialist Susan A. Schneider has called for a reconfiguring of agricultural law away from the “protectionism of big agriculture,” to a focus on food, the environment, and the interest of farmers.¹³⁹

135. Susan A. Schnieder, *A Reconsideration of Agricultural Law: A Call for the Law of Food, Farming, and Sustainability*, 34 WM. & MARY ENV'T. L. & POL'Y REV. 935, 944-45 (2010).

136. Neil D. Hamilton, *Essay—Food Democracy and the Future of American Values*, 9 DRAKE J. AGRIC. L. 9, 10 (2004) (“Progress has reduced our food knowledge and eroded our appreciation for its tastes and differences and for its value in our lives and society. We have substituted the fast foods and cheap foods manufactured by a food industry that deems efficiency and low prices as more important than quality or consumer satisfaction. Worse yet, most people still involved in agriculture do not see themselves as farmers growing food but instead as growers producing commodities, the raw materials food manufacturers process into the convenience foods we consume. The true costs to society of these changes, not just in food, but in health and obesity, satisfaction and confidence, and understanding and appreciation, are just now beginning to be weighed. Separating us from our food has had many affects-not the least of which are how it is cheapening both our food and ourselves.”).

137. See, e.g., MICHAEL POLLAN, IN DEFENSE OF FOOD: AN EATER’S MANIFESTO (2008); MICHAEL POLLAN, OMNIVORE’S DILEMMA: A NATURAL HISTORY OF FOUR MEALS (2006); ERIC SCHLOSSER, FAST FOOD NATION (2005); Michael Pollan, *The Vegetable-Industrial Complex*, N.Y. TIMES MAG., Oct. 15, 2006, http://www.nytimes.com/2006/10/15/magazine/15wwln_lede.html?scp=1&sq=vegetable%20industrial%20complex&st=cse.

138. In recognition of the problems of the anonymity, the USDA has started a program called “know your farmer, know your food.” *Know Your Farmer, Know Your Food*, USDA.GOV, <http://www.usda.gov/wps/portal/usda/knowyourfarmer?navid=KNOWYOURFARMER> (last visited Mar. 12, 2011).

139. Schneider, *supra* note 135, at 946-47 (“This food-based agricultural law, however, cannot be driven solely by protectionism or exceptionalism, and it cannot be focused solely on assuring the economic vitality of the agricultural industry. A return to the agrarianism that reconciles the self-interest of farmers with the public good of society should be the hallmark of the new food-based agriculture. Three unique attributes involved in agricultural production are themselves areas of significant public interest. These unique attributes, reflecting the public’s interest in agricultural production, should frame the outline of the new food-focused agricultural law.”).

Creating local markets where food producers and consumers engage with one another is an ideal focal point for shifting the paradigm, and the concern for food safety should not undermine these efforts.¹⁴⁰

The local food movement is stymied by the food safety regulations such as those in Illinois. One national trend in addressing the issue is the passage of what are referred to in this article as “cottage food industry” exceptions. These laws exempt certain foods and producers from some of the health and safety food regulations so that small food producers and entrepreneurs can sell directly to consumers. Lawmakers must consider the following variables when constructing cottage food industry exceptions: who will be exempt; what food will be included; where and how the food may be sold to

First, agricultural production is the primary way that we obtain food—a product that is essential to human health and survival.ⁿ⁸⁴ Both farmers and the public at large have a fundamental interest in the production of healthy foods, in policies that assure the safety of those foods, and in the ready availability of healthy foods to all segments of society.

Second, agricultural production involves the production of living things, evoking ecological and moral issues that are completely different than the production of inanimate products. That these products are the food we eat accentuates this imperative.

Third, agricultural production is heavily dependent upon the natural world and its resources—in particular, land and water—and it has been both a significant consumer of natural resources and a significant source of environmental degradation. Moreover, it remains heavily dependent on human resources, resources that in the past have often not been adequately respected. Each of these attributes makes agriculture a unique industry, and each reflects an important societal concern.

These fundamental attributes provide policymakers with a new framework for analysis. The new agricultural law should be a system of agricultural laws and policies that promote an agricultural sector that produces healthy food in a sustainable manner. This requires a balancing of the needs of farmers with the needs of consumers, all within the context of protecting both the social fabric of society and the environment.

A balanced system would be a sustainable system reflecting the triad of considerations: economic sustainability, environmental sustainability, and social sustainability.” (internal citations omitted).

140. *Id.* at 951 (“Reform should not, however, discourage small farming operations and regional food processing centers through regulatory structures that are impossible for smaller operations to meet. Smaller, regional food systems may be key to achieving better food transparency, higher quality products, and better connections between consumers and their food.”) (quoting Marne Coit, *Jumping on the Next Bandwagon: An Overview of the Policy and Legal Aspects of the Local Food Movement*, 4 J. FOOD L. & POL’Y 45 passim (2008) (discussing the growth of the local food movement)). See also *id.* at 954-55.

the consumer; and what labeling is required. In other words, who is exempt from what and where?

A. *Who is Exempt?*

It is challenging for legislatures to define which food producers should be exempt. Lawmakers have looked at where the food is produced, specific foods, how much income is generated, and to whom the food is sold as a means of identifying who should qualify. In Ohio, the statutory scheme relies on a definition based on the place, size, and product. The statute reads:

20) Cottage food production operation means a person who, in the person's home, produces food items that are not potentially hazardous foods, including bakery products, jams, jellies, candy, fruit butter, and similar products specified in rules adopted pursuant to section 3715.025 of the Revised Code.¹⁴¹

The language in the 2010 Michigan bill uses similar language and limits the exemptions to food produced in a person's "primary personal residence."¹⁴² The definitions exclude "communal residential settings" and structures such as "outbuildings, sheds, and barns."¹⁴³ Pennsylvania's statute uses the term "private home."¹⁴⁴ Utah has taken a slightly different approach and set up an alternative inspection system for cottage food producers.¹⁴⁵ Utah's cottage food exception operates by creating a separate regulatory scheme for cottage food producers. Those home cooks who produce non-potentially hazardous foods that are prepared in a kitchen designed for residential purposes need not have things such as stainless steel surfaces or a commercial sink, dishwasher, or oven.¹⁴⁶ However, the home producer is still subject to the regulations of the Utah De-

141. OHIO REV. CODE ANN. § 3715.01(A)(20) (West 2011). This statute defines "home" as "the primary residence occupied by the residence's owner, on the condition that the residence contains only one stove or oven used for cooking, which may be a double oven, designed for common residence usage and not for commercial usage, and that the stove or oven be operated in an ordinary kitchen within the residence." *Id.* See also OHIO ADMIN. CODE 3717(B)(4)(B) (2008).

142. MICH. COMP. LAWS § 289.1105(h) (2010) ("Cottage food operation" means a person who produces or packages cottage food products only in a kitchen of that person's primary domestic residence within this state.).

143. MICH. COMP. LAWS § 289.1105(k).

144. 3 PA. STAT. ANN. § 5712 (West 2011).

145. UTAH CODE ANN. § 4-5-9.5 (West 2010).

146. UTAH CODE ANN. § 4-5-9.5(3)(a).

partment of Agriculture and Food, and so must pay for inspections and fees.¹⁴⁷

Kentucky has created an alternative food regulatory system for farmers only.¹⁴⁸ The statutory scheme divides the farmer/food producers as follows:

(56) "Home-based processor" means a farmer who, in the farmer's home, produces or processes whole fruit and vegetables, mixed-greens, jams, jellies, sweet sorghum syrup, preserves, fruit butter, bread, fruit pies, cakes, or cookies;

(57) "Home-based microprocessor" means a farmer who, in the farmer's home or certified or permitted kitchen, produces or processes acid foods, formulated acid food products, acidified food products, or low-acid canned foods, and who has a net income of less than thirty-five thousand dollars (\$35,000) annually from the sale of the product;"¹⁴⁹

The distinction, discussed further below, between high and low risk food products is seen elsewhere. Kentucky, like other states, has used income as a means of defining eligibility for exemptions, but Kentucky applies the income limitation only to producers of higher risk foods.¹⁵⁰ Lawmakers assume that at some threshold level of business growth, the food producer creates a larger risk to the public and should have the resources to pay inspection fees and invest in the equipment required by the health department. The Minnesota scheme exempts manufacturers whose yearly revenues are lower than \$5,000.¹⁵¹ The law passed in 2010 in Michigan exempts producers whose annual gross income from food sales is less than \$15,000.¹⁵² As noted above, the Tester amendments to the Federal Food Safety Modernization Act¹⁵³ exempt producers who earn less

147. UTAH CODE ANN. § 4-5-9.5(3)(b); UTAH ADMIN. CODE r. 70-560-5 (2011).

148. See KY. REV. STAT. ANN. § 217.015 (59) (West 2011) (defining "farmer"); KY. REV. STAT. ANN. § 217.136 (explaining exemptions for "home based processors").

149. KY. REV. STAT. ANN. § 217.015 (56)-(57); see KY. REV. STAT. ANN. § 217.015(51) (defining "home").

150. KY. REV. STAT. ANN. § 217.015 (56)-(57).

151. MINN. STAT. § 28A.15(9)-(10) (2009).

152. MICH. COMP. LAWS § 289.4105(e); MICH. COMP. LAWS § 289.4102(1) ("A cottage food operation is exempt from the licensing and inspection provisions of this act. This exemption does not include an exemption from the labeling, adulteration, and other standards imposed in this section or under this act, or both... if (5) The gross sales of cottage food products shall not exceed \$15,000.00 annually... The department may request in writing documentation to verify the gross sales figure.").

153. Amendments WHI10112 and KER10161 to S.B. 510, 111th Cong. (2010) (enacted).

than \$500,000 from some of the reporting requirements.¹⁵⁴ Tester's second amendment focuses on who the product is sold to, and creates an exemption for those who are selling directly to consumers as opposed to other retailers or wholesalers.¹⁵⁵

Regulatory strategies rely heavily on inspections of the place of production, but an alternative approach is to certify or license the individual.

B. What Foods Are Exempt?

In defining what foods are covered by the cottage-industry-exemption statutes, states have passed legislation that exempts specific foods such as honey or maple syrup,¹⁵⁶ lists examples of exempt foods, and/or makes clear that hazardous foods cannot be exempt.¹⁵⁷ In 2010, Illinois passed legislation so that honey that is in the comb or removed from the comb in an unadulterated condition is exempt from the Illinois Food, Drug, and Cosmetic Act.¹⁵⁸ The honey must be sold in its unadulterated state at a local market, and the law exempts from inspection and regulation producers who pack and sell less than 500 gallons of honey in the state of Illinois in one year.¹⁵⁹ Prior to passage of the bill, honey that had been removed from the comb was considered a "processed food" which meant regulators could require small honey producers to use commercial kitchens.¹⁶⁰ The head of the Illinois Public health food processing program objected to the bill because, although she could not recall any recent reports of honey-related illnesses, there is always the possibility.¹⁶¹ This statement is typical of health departments that

154. Amendment WHI10112 to S.B. 510, 111th Cong. (2010) (enacted).

155. Amendment KER10161 to S.B. 510, 111th Cong. (2010) (enacted).

156. *See, e.g.*, 2010 Ill. Legis. Serv. 96-1028 (West 2011).

157. *See, e.g.*, OHIO CODE ANN. § 3715.025 (West 2011).

158. 2010 Ill. Legis. Serv. 96-1028 (defining honey that is in the comb or removed from the comb in an unadulterated condition as a "raw agricultural commodity") The bill also states that the Department of Health "may not regulate honey that is in the comb or removed from the comb in an unadulterated condition. *Id.* Governor Pat Quinn signed SB2959 into law on June 13, 2010 and it became effective January 1, 2011. *Id.* *See also* OHIO REV. CODE ANN. § 3715.01(A)(12) (defining "honey").

159. 410 ILL. COMP. STAT. 650/7(c) (2011).

160. Diane Ivey, *A Sticky Situation: Bill Would Stop Regulation of Hobbyist Honey Producers*, ILL. TIMES (Mar. 4, 2010), <http://www.illinoistimes.com/Springfield/article-7019-a-sticky-situation.html>.

161. *Id.* ("Elizabeth Watkins, Public Health's food processing program coordinator, says while she can't recall any recent reports of honey-related illnesses with

operate on fear rather than science or data about actual risks. Michigan has also exempted honey and maple syrup.¹⁶²

Illinois explicitly prohibits the sale of home-canned goods because of a fear of toxins.¹⁶³ Under Wisconsin Act 101, the "Pickle Bill," home producers may sell home-canned fruits and vegetables that are naturally high in acid.¹⁶⁴ Examples of allowable foods are: pickled fruits and vegetables (not refrigerator pickles), salsas and chutneys, sauerkraut and kimchi, jams and jellies, and applesauce.¹⁶⁵ Kentucky's statutory scheme also distinguishes highly acidic foods from others produced on the farm.¹⁶⁶ Under the South Dakota scheme, home food producers of canned goods who want to be exempt from inspections must have recipes approved by an official third party processing authority.¹⁶⁷ Minnesota does not require approval of recipes but encourages food producers to "have the recipe and manufacturing process reviewed by a person knowledgeable in the food canning industry and recognized by the commissioner as a process authority."¹⁶⁸

As described above, chocolates, candies, and other baked goods that are made in home kitchens should not appear at an Illinois farmers' market,¹⁶⁹ and they are similarly prohibited from Wisconsin's farmers' markets.¹⁷⁰ Commercially produced, pre-packaged baked goods that are properly labeled may be sold at the market, so

hobbyist producers, anyone who makes hundreds of gallons of honey is susceptible because they must store the excess product. If it gets too hot or cold, the honey can change consistency, which puts it at greater risk for disease. 'Tainted honey can contain pathogens or chemicals,' Watkins says. 'It's not often the case with hobby beekeepers, but the issue is, a lot of food is changing. Peanut butter is growing bacteria now. The possibility is there.' ").

162. 2010 MICH. PUB. ACTS 77.

163. TECHNICAL INFORMATION BULLETIN/FOOD #30, *supra* note 53.

164. *Selling Home-Canned Foods: Do it Safe, Do it Legal*, FOODSAFETY.WISC.EDU, http://www.foodsafety.wisc.edu/pickle_bill.html (last visited Mar. 14, 2011).

165. *Id.* Minnesota also exempts canned fruits and vegetables with low acidity. MINN STAT. ANN. 28A.15 Subd. 10 (West 2011).

166. KY. REV. STAT. ANN. § 217.215(56)–(57) (West 2010).

167. S.D. COOP. EXTENSION SERV., SOUTH DAKOTA REQUIREMENTS FOR THE SALE OF BAKED GOODS AND HOME-CANNED PROCESSED FOODS AT FARMERS MARKETS 3 (2010), *available at* http://pubstorage.sdstate.edu/AgBio_Publications/articles/FS956.pdf (discussing South Dakota HB 1222).

168. MINN. STAT. ANN. 28A.15 Subd. 10(c).

169. TECHNICAL INFORMATION BULLETIN/FOOD #30, *supra* note 53.

170. DR. BARBARA INGHAM, STARTING A SMALL FOOD BUSINESS IN WISCONSIN (2008), *available at* http://www.foodsafety.wisc.edu/assets/factsheets/small_business_FactSheet08.pdf.

individually wrapped Twinkies might be available.¹⁷¹ However, Ohio allows the sales of home baked goods.¹⁷²

Michigan's statute lists foods and refers to the federal regulations regarding hazardous foods.¹⁷³ The Pennsylvania¹⁷⁴ and Minnesota statutes refer to the sale of non-hazardous foods as defined by regulation.¹⁷⁵ The Federal Department of Agriculture publishes a "Food Code" that is a model states can rely on.¹⁷⁶ In Chapter 1, the definition of "potentially hazardous foods" is "FOOD that requires time/temperature control for safety (TCS) to limit pathogenic microorganism growth or toxin formation."¹⁷⁷

Maine has taken the unusual step of creating a cottage-industry-type exemption from inspection for small operations that slaughter chickens.¹⁷⁸ The law is entitled "An Act to Increase Access to Farm

171. TECHNICAL INFORMATION BULLETIN/FOOD #30, *supra* note 53.

172. OHIO REV. CODE ANN. §§ 3715.01(A)(20), 3715.025 (West 2011).

173. MICH. COMP. LAWS 289.1105(i) (West 2010) ("Cottage food product" means a food that is not potentially hazardous food as that term is defined in the food code. Examples of cottage food product include, but are not limited to, jams, jellies, dried fruit, candy, cereal, granola, dry mixes, vinegar, dried herbs, and baked goods that do not require temperature control for safety. Cottage food product does not include all potentially hazardous food regulated under 21 C.F.R. §§ 113 and 114, examples of which include, but are not limited to, meat and poultry products; salsa; milk products; bottled water and other beverages; and home-produced ice products. Cottage food product also does not include canned low-acid fruits or acidified vegetables and other canned foods except for jams, jellies, and preserves as defined in 21 C.F.R. § 150.")

174. Pennsylvania Senate Bill 828 (enacted into law as Act 31 of 2010) exempts specifically defined food sales or food service from Pennsylvania's Public Eating and Drinking Place Law. 35 PA. STAT. §§ 655.1-655.13. 2010 Pa. Legis. Serv. Act 2010-31 (West 2011). The food served must not be classified as a "potentially hazardous food." *Id.* See *id.* (defining "potentially hazardous food").

175. See, e.g., MINN. STAT. ANN. § 28A.15 Subd. 9 (West 2011) ("An individual who prepares and sells food that is not potentially hazardous food, as defined in rules adopted under section 31.11"). See also OHIO REV. CODE ANN. §§ 3715.01(A)(20) and 3715.025.

176. U.S. DEP'T OF HEALTH AND HUMAN SERV., PUB. HEALTH SERV., FOOD & DRUG ADMIN., FOOD CODE (2009), available at <http://www.fda.gov/downloads/Food/FoodSafety/RetailFoodProtection/FoodCode/FoodCode2009/UCM189448.pdf>.

177. *Id.* at 15.

178. ME. REV. STAT. ANN. tit. 22, § 2517-C (West 2011) ("Notwithstanding section 2512 and whether or not the poultry are intended for human consumption, inspection is not required for the slaughter of poultry or the preparation of poultry products as long as the poultry are slaughtered or the poultry products are prepared on the farm where the poultry were raised and:

- A. Fewer than 1,000 birds are slaughtered annually on the farm;
- B. No birds are offered for sale or transportation in interstate commerce;
- C. Any poultry products sold are sold only as whole birds;

Fresh Poultry.”¹⁷⁹ As noted above, meat products carry special risks and are more highly scrutinized than produce. The Maine exemption is limited to farms that slaughter less than 1,000 chickens per year, comply with specific labeling requirements, and have a limited point of sale.¹⁸⁰ The producer is required to assign “lot numbers to all birds sold and maintain records of the assigned lot number and the point of sale mark lot numbers” so that there is accountability should there be a food safety incident.¹⁸¹

C. Where Can the Food Be Sold?

States limit the location of the “point of sales” of the home-produced foods to farmers markets, road side stands, or similar events such as church and community bazaars or festivals.¹⁸² Kentucky specifically prohibits home-produced goods from being sold in a place where the product might not be able to be traced back to the farmer.¹⁸³ Thus, regulations prevent the sale of home-produced goods at restaurants or across state lines.¹⁸⁴ The exempt slaughtered chickens in Maine can be sold at the farm, at farmers markets, to restaurants within a fifty-mile radius of where the poultry was raised, delivered to the consumer’s home, or received by a community member through a Community Supported Agriculture organization that has a direct relationship with the farm where the poultry was raised.¹⁸⁵ None of the other statutes studied for this article make

D. The poultry producer has a valid license issued under section 2514;

E. The facilities for slaughtering and processing are in compliance with rules adopted under subsection 6;

F. The poultry producer assigns a lot number to all birds sold and maintains a record of assigned lot numbers and the point of sale; and

G. The poultry are sold in accordance with the restrictions in subsection 2.”)

Illinois prohibits the sale of home processed poultry at the market. TECHNICAL INFORMATION BULLETIN/FOOD #30, *supra* note 53.

179. ME. REV. STAT. ANN. tit. 22, §2517-C.

180. ME. REV. STAT. ANN. tit. 22, § 2517-C(2)-(3).

181. ME. REV. STAT. ANN. tit. 22, § 2517-C(1)(f).

182. *See, e.g.*, KY. REV. STAT. ANN. § 217.136(5) (West 2010); 902 KY. ADMIN. REGS. 45:090 § 2(12) (2010); S.D. COOP. EXTENSION SERV., *supra* note 167 (discussing South Dakota HB 1222. Food products covered by this legislation can only be sold at farmers markets, roadside stands, and similar events such as church and community bazaars or festivals.).

183. 902 KY. ADMIN. REGS. 45:090 § 2(12) (“Products processed by home-based processors shall not be used or offered for consumption in a retail-food establishment, by internet sales, or sold in interstate commerce.”).

184. *Id.*

185. ME. REV. STAT. ANN. tit. 22, § 2517-C(2).

reference to sales through CSAs which are an increasing trend. Pennsylvania allows home-produced, non-hazardous foods to be exempt from state health department inspections if they are being offered by tax-exempt organizations.¹⁸⁶ This exemption is different than the “bake sale” exceptions, which are more limited to occasional events.¹⁸⁷

D. What Notice Is Required?

Labeling is another element of many of the cottage-industry-exemption bills. South Dakota and Kentucky require a clearly legible label on the food indicating the ingredients, the producer’s contact information, the date the food was produced, and a disclosure that the food was not prepared in a commercial kitchen.¹⁸⁸ Illinois has similar requirements but does not require nutritional labeling if the producer makes less than \$10,000 gross sales.¹⁸⁹ The chickens that are slaughtered and sold from un-inspected farms in Maine must have similar labels to those required in South Dakota, but must also have safe handling instructions.¹⁹⁰ Minnesota requires signage at the point of sale that provides the consumer with notice that the product was not produced in a state-inspected facility, and each container must provide the name and address of the person who processed the goods and the date that the item was processed or canned.¹⁹¹

E. What Does Exemption Mean?

In some states, the food producers are entirely exempt from any regulation and concerns for safety are met by the personal contact between the food producer and the consumer and by some requirements for labeling.¹⁹² As discussed above, in Kentucky, the

186. 2010 Pa. Legis. Serv. Act. 2010-31 (West 2011) (amending the Public Eating and Drinking Place Law) Note that the Pennsylvania statute refers back to the United States Department of Health definitions of hazardous foods. *Id.*

187. See e.g., TECHNICAL INFORMATION BULLETIN/FOOD #30, *supra* note 53.

188. KY. REV. STAT. ANN. § 217.136; Alexa Nemeth, *South Dakota Law to Ensure Farmers Market Safety*, FOOD SAFETY NEWS (July 23, 2010), <http://www.foodsafetynews.com/2010/07/state-law-to-ensure-farmers-market-safety/>. See also TECHNICAL INFORMATION BULLETIN/FOOD #30, *supra* note 53.

189. TECHNICAL INFORMATION BULLETIN/FOOD #30, *supra* note 53.

190. ME. REV. STAT. ANN. tit. 22, § 2517-C(3).

191. MINN. STAT. ANN. § 28A.15 Subd. 10(4) (West 2011); MINN. STAT. ANN. § 28A.15 Subd (10)(5).

192. See, e.g., MICH. COMP. LAWS 289.4102 (West 2010).

farmer/home-based processors who are producing items such as baked goods are exempt if they meet some minimum requirements—for example clean jars, proper labeling, and annual registration.¹⁹³ As part of their registration, they must show a clean water supply, an adequate waste system, and that neither children under the age of 12 nor pets are in the food preparation area when the food is being made.¹⁹⁴ The certification is provided when all of the paperwork is complete.¹⁹⁵ However, the farmer/home-based micro processors' facilities may be subject to an annual inspection and must meet minimum requirements that are still somewhat lower than larger commercial producers.¹⁹⁶ Moreover, the micro-food producers themselves must participate in a program on food safety that is administered by the Kentucky Cooperative Extension Service.¹⁹⁷

V. CONCLUSION

Until the spring of 2009, small food entrepreneurs could sell home-made pies, breads, candies, jams, pickles, and salsas at the farmers market in Urbana, Illinois.¹⁹⁸ Notice went out from the Health Department in April, 2009, in which the Director for Environmental Health for the Public Health District informed vendors that all health regulations were going to be strictly enforced so all goods had to be produced in a certified commercial kitchen.¹⁹⁹ The late notice meant people who had set aside fruit and made plans to earn income based on past sales were forced to abandon their projects or find a commercial kitchen to rent. There had not been any problems of people getting sick from home produced food. The strict enforcement also meant that growers could no longer offer a slice of a peach or apple to entice buyers to choose their produce

193. KY. REV. STAT. ANN. § 217.136; 902 KY. ADMIN. REGS. 45:090 § 2(2) (describing the registration process).

194. 902 KY. ADMIN. REGS. 45:090 § 2(2), (13), (15).

195. 902 KY. ADMIN. REGS. 45:090 § 2(16).

196. KY. REV. STAT. ANN. § 217.137 (mandating the promulgation of regulations and setting minimum standards); 902 KY. ADMIN. REGS. 45:090 § 3(2) (regulations on home-processor registration).

197. KY. REV. STAT. ANN. § 217.138 (addressing the certification of the person).

198. Mike Monson, *Health Rule has Farmers' Market Vendors Scrambling*, NEWS GAZETTE (Apr. 25, 2009), <http://www.news-gazette.com/news/health/miscellaneous/2009-04-25/health-rule-has-farmers-market-vendors-scrambling.html>.

199. *Id.*

over the competing farmers in the next booth, because such a slice is considered food production that requires hand-washing stations.

Certified commercial kitchens that are privately or publicly owned and rented out to food entrepreneurs are one answer, but there is limited access to such facilities, particularly in smaller towns and rural areas. Low income neighborhoods in cities of all sizes where people are trying to engage in start-up food production as a path out of poverty are unlikely to have access to legal, certified kitchens. Moreover, creating such certified commercial kitchens is an expensive and complicated endeavor. Public schools are serving prepared foods that are just heated up so they no longer have full kitchens for food preparation, and other public entities that do have certified kitchens, like churches or other places of worship, cannot afford the liability or inconvenience of renting out space. The black market for locally produced food is probably the most dangerous alternative.

Small food producers and entrepreneurs should be able to legally sell their food directly to consumers who choose to buy foods that are produced or processed in uncertified kitchens. More states should pass legislation that exempts such foods from overly-restrictive legislation that inhibits the local-food movement, and some states should re-examine whether they have gone far enough. Kentucky has limited its exemptions to farmers when food producers may come from many other walks of life. Exemptions should be based on science rather than hysteria. For example, why should honeycombs need to be emptied of their honey in a certified commercial kitchen? Product specific exemptions that take into account real information about the likelihood of risk are most the sensible, since, for example, an apple pie does not pose the same risk as a banana custard pie. Dollar amounts, such as the \$5,000 limit in Michigan, make sense as an indication that the production is so small that it is unreasonable to insist on any regulation or for local governmental entities to spend money on inspections. However, scale of production that takes into account factors such as quantity, complexity of process, ingredients, equipment, and labor rather than dollar profits may be more sensible for some products. Some places might decide the local farmer who wants to wash and bag raw carrots should be allowed to do so without regulation even if she will make more than \$5,000. Food safety can be protected by inspecting the location of the food production, but what is often ignored—and may be more important—is the training of the people who are engaging in the food preparation. Therefore, low cost, frequent courses on safe food handling that result in certification of a

person, rather than a place, are a better alternative for many jurisdictions.²⁰⁰ The public point of sale, such as the well-managed farmers' market, provides another safeguard. Local foods sold through interstate, retail, wholesale, and internet sales should not be allowed exemptions because the anonymity is an invitation to risk. When the food producer meets his or her consumer, the personal interaction provides an opportunity for the consumer to assess the seller's character and conduct. Finally, the labeling requirements of most states are probably the most critical component. Consumers are entitled to notice about who produced the food, what its contents are, and the date of production.

Local, real food is good for health, commerce, the environment, and the quality of life in a community. Small, local food growers and producers should not be destroyed as we become more frightened by our industrial and global food system. The design and implementation of rules and regulations should be precisely calibrated to avoid over-regulation that unduly burdens the consumers who want to buy directly from local producers and those food entrepreneurs who want to sell to them.

200. In January, 2011 in Illinois, The Local Food Entrepreneur & Cottage Food Operation Act SB 137 was proposed by Senator Koehler to create cottage industry exemptions that include a scheme of certifying the food producer rather than the place. See *Bill Status of SB0137*, ILL. GEN. ASSEMBLY, <http://www.ilga.gov/legislation/billstatus.asp?DocNum=137&GAID=11&GA=97&DocTypeID=SB&LegID=54914&SessionID=84> (last visited Mar. 13, 2011). As this article goes to press, it appears that a version of the bill will pass both houses and be signed by the governor. Amendment to S.B. 0840, 97th Gen. Assemb., Re.Sess. (Ill. 2011), available at <http://www.ilga.gov/legislation/fulltext.asp?DocName=09700SB0840ham001&GA=97&SessionId=84&DocTypeId=SB&LegID=55671&DocNum=840&GAID=11&Session=>.